No. 09-1548

JUL 21 2010

In The Supreme Court of the United States

KING CHI LUM,

Petitioner,

v.

KAUAI COUNTY COUNCIL; BRYAN BAPTISTE, individually, and in his capacity as the Mayor of Kauai, State of Hawaii; LEON GONSALVES, SR., individually, and in his capacity as a Commissioner, Kauai Police Commission; MICHAEL H. TRESLER, individually, and in his capacity as the Director of Finance, Kauai County; KAUAI COUNTY, and JOHN DOES 1 to 20 and JANE DOES 1 to 20,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS KAUAI COUNTY COUNCIL, BRYAN BAPTISTE, MICHAEL H. TRESLER, AND KAUAI COUNTY'S BRIEF IN OPPOSITION TO PETITIONER KING CHI LUM'S PETITION FOR WRIT OF CERTIORARI

GREGG M. USHIRODA
Counsel of Record
MELVYN M. MIYAGI
ANGELA T. THOMPSON
WATANABE ING LLP
First Hawaiian Center
999 Bishop Street, 23rd Floor
Honolulu, Hawaii 96813-4428
Telephone: (808) 544-8300
Facsimile: (808) 544-8399
Email: gushiroda@wik.com

ALFRED B. CASTILLO
OFFICE OF THE COUNTY ATTORNEY
COUNTY OF KAUAI
4444 Rice Street, Suite 220
Lihue, Hawaii 96766
Telephone: (808) 241-4930

Counsel for Kauai County Council, Bryan Baptiste, Michael H. Tresler, and Kauai County

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit Court of Appeals correctly affirmed the District Court's decision in favor of Respondents COUNTY OF KAUAI ("the County"), KAUAI COUNTY COUNCIL ("the Council"), Mayor BRYAN BAPTISTE ("Mayor Baptiste") and MICHAEL H. TRESLER ("Director Tresler") (collectively referred to as "County Respondents"), holding that a contract void *ab initio* does not give rise to a property interest that triggers Due Process protection under the 14th Amendment.

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I. STATEMENT OF THE CASE

A. Factual History

This case arises from the tainted process by which the Chief of Police for the County of Kauai Police Department ("KPD") was selected in 2003-04 by the Kauai Police Commission ("Commission").

In April 2004, the Commission selected Petitioner to serve as the Interim Chief by a 3-2 vote. Petitioner's selection as Interim Chief was controversial, not only because it deviated from the normal chain of command, but because it gave Petitioner advantages over the other candidates for the permanent position.

On November 18, 2005, a contested case hearing was held before Hearing Officer E. John McConnell, a highly respected retired State Circuit Court judge, concerning an ethics complaint that was filed against Police Commissioner Michael Ching ("Ching"), which the County of Kauai Board of Ethics ("Ethics Board") had investigated. Ching and the Ethics Board were each represented by counsel at all times during the contested case hearing. Each party was afforded a full and complete opportunity to call and examine witnesses, and to offer evidence. During the hearing, testimony was taken from Ching, several KPD officers and Respondent LEON GONSALVES, SR. ("Respondent Gonsalves").

On February 23, 2006, after carefully considering the totality of the evidence in light of the claims and contentions of each of the parties presented at the

contested case hearing, Judge McConnell determined that Ching violated Article XX, Section 20.02E of the Kauai County Charter and Chapter 3, Article 1, Section 3-1.6 of the Kauai County Code by actively soliciting support for Petitioner from the State of Hawaii Organization of Police Officers ("SHOPO") and by manipulating the selection process to place Petitioner in the Interim Chief position. According to Judge McConnell, Ching used his position as a Police Commissioner to secure an unwarranted advantage and treatment for Petitioner over the other candidates.

On March 23, 2006, the Ethics Board relied on Judge McConnell's decision and recommended to the Council that Director Tresler void the County's employment contract with Petitioner.

On April 12, 2006, after due deliberation, the Council unanimously accepted and ratified the recommendations of the Ethics Board to cancel Petitioner's employment agreement. On April 17, 2006, the Council informed the Director of Finance, Director Tresler, that after due deliberation, it unanimously accepted the recommendations of the Board of Ethics and voted to void Petitioner's employment contract.

On April 27, 2006, Director Tresler informed Petitioner of his intention to void Petitioner's employment agreement pursuant to Sections 3-1.11(a) and (b) of the Kauai County Code. Director Tresler also informed Petitioner that Section 3-1.11(a) stated in

part that, "in any action to avoid a contract pursuant to this section the interests of third parties who may be damaged thereby shall be taken into account." Director Tresler therefore gave Petitioner the opportunity to provide any facts, documents, reasons and/or justifications explaining why Petitioner's employment agreement should not be cancelled. On May 4, 2006, counsel for Petitioner responded to Director Tresler and requested a hearing for Petitioner.

On May 12, 2006, Petitioner was advised that Director Tresler had not made a final decision on whether to void the employment agreement. Petitioner was again advised that any such decision would be based on Judge McConnell's Findings of Fact and Conclusions of Law and his Hearing Officer's Report. With respect to his request for a hearing, Petitioner was told that Section 3-1.11 of the Kauai County Code did not require a hearing since this was an action to void a contract. Rather, the section required that Petitioner's interests be "taken into account" by Director Tresler, who offered Petitioner an opportunity to make a private, transcribed oral presentation discussing any effect the contract cancellation may have on his interests.

Petitioner rejected Director Tresler's offer to meet and to make an oral presentation. Despite the rejection, Petitioner was assured that Director Tresler would fully consider Petitioner's interests pursuant to Section 3-1.11(a) of the Kauai County Code.

On May 30, 2006, after fully considering and taking into account Petitioner's interests, Director Tresler informed Petitioner that his employment agreement would be voided because his selection as Police Chief was the result of a tainted and/or compromised selection process. Petitioner's employment agreement was to be cancelled on June 7, 2006 in order to provide Petitioner with sufficient time to be transferred back to his prior position of lieutenant without any break in service, if he so desired.

On May 31, 2006, before Petitioner's employment contract was officially cancelled, Petitioner submitted his resignation, stating that he would retire at the close of business on June 7, 2006.

The County Respondents did not terminate Petitioner from his position as Chief of Police. Rather, Petitioner's contract was to be voided because it was secured by a fraud that had been perpetrated from the inception of that contract. Petitioner was not denied any Due Process because he simply did not have any property interest in his void employment agreement. The Court of Appeals and District Court accordingly did not err in holding that County Respondents did not violate Petitioner's Due Process interests.

B. Procedural History

The present appeal arises from the Ninth Circuit Court of Appeals' decision to affirm the District Court's correct and reasoned decision in favor of

County Respondents regarding the cancellation of Petitioner's employment contract due to fraud. By merely repeating his previous arguments to the lower courts, Petitioner has not set forth any basis for which this Court should grant certiorari.

Petitioner alleges that various statutory and Constitutional rights were violated when his contract for employment as the Chief of Police for the KPD was cancelled. According to Petitioner, his employment contract was cancelled because he purportedly voiced his opposition to being subjected to an alleged racial slur by Respondent Gonsalves and/or because he reported suspected law violations by KPD officers in 1995, which ultimately led to disciplinary actions and/or criminal investigations against several KPD officers in 2005. Petitioner thus commenced this action against the County Respondents and Respondent Gonsalves alleging the following claims:

(1) race/national origin discrimination and retaliation in violation of 42 U.S.C. § 2000e-2 et seq., and Haw. Rev. Stat. § 378-2;

(2) violation of 42 U.S.C. § 1981;

(3) civil conspiracy in violation of 42 U.S.C. § 1981 and 42 U.S.C. § 1985;

(4) denial of Due Process, violation of public policy of the State of Hawaii, and breach of Petitioner's employment contract with the County; and

(5) violation of the Hawaii Whistleblowers' Protection Act, as contained in Haw. Rev. Stat. § 378-62.

As the District Court aptly determined, none of these claims are supported in law or fact.

Through a succession of motions for summary judgment brought by County Respondents between December 22, 2006 and September 25, 2007, the District Court dismissed all claims in favor of County Respondents. Notably, with regard to the Petitioner's Due Process claim, the District Court held that Petitioner did not have any protected property interest in his employment because Petitioner's "appointment and contract became void as a matter of law once it was determined that [Petitioner] had become the Chief of Police via a process that violated County law." Order Granting Defendants' Motion for Partial Summary Judgment, May 18, 2007, Petition Appendix at 85a. The District Court therefore granted summary judgment in favor of the County Appellees on Petitioner's Due Process claim.

With regard to Petitioner's claims of animus or bias against Director Tresler, the District Court provided Petitioner more than an ample opportunity to provide evidence of any race- or class-based animus by Director Tresler to support Petitioner's newly alleged Section 1981 claim. In response, Petitioner's counsel relied upon:

(1) Director Tresler's purported statement that the media had blown a matter out of proportion;

(2) Director Tresler's expressed concern, as the Director of Finance, regarding the expense of defending against Petitioner's claim;

(3) Director Tresler's alleged comments to Richard Stauber about wanting to remove certain police commissioners; and

(4) Director Tresler's decision to cancel Petitioner's employment contract.

The District Court was not persuaded by Petitioner's oral argument regarding the alleged "evidence" of racial animus by Director Tresler. The District Court therefore granted summary judgment in favor of Director Tresler on the Third Claim For Relief after finding that Petitioner failed to "raise a genuine issue of fact as to whether Tresler conspired against Lum because of Lum's race." Order Granting Defendant Michael H. Tresler's Motion for Summary Judgment, September 25, 2007, Petition Appendix at 63a.

On March 28, 2008, the Stipulation to Dismiss was filed. The District Court then entered the Order Entering Judgment on April 28, 2008, and a Judgment in a Civil Case based upon a Decision by Court was filed on April 29, 2008.

On April 25, 2008, Petitioner filed his Notice of Appeal and the Ninth Circuit Court of Appeals heard oral arguments on October 14, 2009. In its Memorandum Decision filed on December 1, 2009, the Court of Appeals properly affirmed the District Court's rulings, noting that "[t]he district court correctly determined that [Petitioner] does not have a viable Due Process claim. [Petitioner's] employment agreement was tainted by ethical violations by one of the police commissioners, so it was illegal and void ab

initio." Ninth Circuit Opinion, Petition Appendix at 3a. As to Petitioner's claims against Director Tresler, it also noted that Petitioner had "alleged no facts suggesting that Tresler acted on the basis of racial or class-based animus[.]" Ninth Circuit Opinion, Petition Appendix at 4a. Petitioner's Petition for Panel Rehearing and Petition for Rehearing En Banc were subsequently denied by the Court of Appeals.

For the reasons set forth below, this Court should affirm the Court of Appeals' rulings on those matters.

II. SUMMARY OF ARGUMENT

This case does not require review by this Court or call for an exercise of this Court's supervisory power. Petitioner merely restates his previous arguments and does not offer any legal authority from this Court or other circuits that presents a conflict with the decisions of the lower courts. Accordingly, it cannot be said that the lower court decisions either conflict with relevant decisions of this Court or sanctions such a departure by a lower court so as to warrant review by this Court.

As for the merits of Petitioner's arguments, Petitioner has not set forth any basis to overturn the reasoned rulings of the Ninth Circuit Court of Appeals and the District Court. The lower courts did not err in concluding that Petitioner could not establish the existence of any protected property interest in an employment agreement that had been secured through a tainted process that violated County law and was thus not entitled to any Due Process of law.

The lower courts similarly did not err when they held in favor of Director Tresler as to all claims asserted against him in the Complaint. Petitioner has continually failed to identify any evidence of class- or race-based animus on the part of Director Tresler to support any claim of bias. Petitioner's vague allegations of Director Tresler's partiality is unfounded, especially given that Petitioner has no Due Process interest in his employment.

Under these circumstances, it is respectfully requested that the Petition For Writ Of Certiorari be denied or, alternatively, that the decision of the Ninth Circuit Court of Appeals be affirmed.

III. ARGUMENT

A. Certiorari Is Not Warranted Because Petitioner Merely Repeats His Previously Unsuccessful Arguments Without Articulating A Conflict Or Departure From Judicial Proceedings Necessitating Review By This Court

Contrary to Petitioner's implications, the Ninth Circuit Court of Appeals' decision in this case does not conflict with decisions of this Court or other United States appellate courts on the same matter. The grant of certiorari is governed by U.S. Supreme Court Rule 10, which states, in relevant part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. ***A petition for a writ of certiorari will be granted***

> ***only for compelling reasons.*** The following, although neither controlling nor fully measuring the court's discretion, indicate the character of the reasons the court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

U.S. Sup. Ct. R. 10 (emphasis added). Although Rule 10 does not provide an inclusive list of all reasons warranting certiorari, it makes clear that Petitioner must present a compelling reason for a grant of certiorari, such as a conflict between the lower court's decision and the decision of another circuit, a state court of last resort, or this Court; or that there has been a departure in the usual course of judicial

proceedings; but not merely that the lower court has made an erroneous factual finding.

In this case, Petitioner completely ignores this applicable standard for a grant of certiorari and provides the Court with no reason that would satisfy the standards laid out in Rule 10. Instead, Petitioner just reargues the exact same points that were correctly discounted by the Court of Appeals and the District Court. Indeed, without directly asserting a conflict, Petitioner cites to cases with which the decision below allegedly conflicts, oblivious to the fact that the exact same cases were unsuccessfully argued in the exact same fashion to the District Court and Court of Appeals. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *McClure v. Indep. School Dist. No. 16, Mayes County, Oklahoma*, 228 F.3d 1205 (10th Cir. 2000); *Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990); *Hui Malama Aina O Ko'olau v. Pacarro*, 4 Haw. App. 304, 666 P.2d 177 (1983); *Waikiki Resort Hotel, Inc. v. City and County of Honolulu*, 63 Haw. 222, 624 P.2d 1353 (1981). Upon careful consideration of both Petitioner's arguments and County Respondents' briefs in opposition, both the District Court and the Court of Appeals were unpersuaded by Petitioner's arguments and citations to legal authorities; County Respondents successfully demonstrated that Petitioner's authorities were inapplicable and not dispositive of the instant case. Accordingly, it is misleading of Petitioner to imply that the Ninth Circuit Court of Appeals' opinion

conflicts with decisions of this Court and of other circuits' opinions.

Additionally, County Respondents are compelled to direct the Court's attention to Petitioner's third Question Presented, which presents a newly-raised argument regarding the lower courts' consideration of Judge McConnell's Findings of Fact and Conclusions of Law and his Hearing Officer's Report. Because Petitioner failed to raise this argument before either the District Court or the Court of Appeals, the argument is deemed waived and not appropriate for consideration on appeal. *Duignan v. United States*, 274 U.S. 195, 200 (1927); *Aholelei v. Dept. of Public Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007). Petitioner has additionally articulated no compelling reason why this issue was not previously raised. Accordingly, Petitioner's third Question Presented does not meet the standard for review by this Court.

Under these circumstances, where no true conflict exists given the Ninth Circuit Court of Appeals' clear affirmation of the district court's decision that was well-founded in legal precedent, issuance of a writ of certiorari is not necessary.

B. Review Of The Question Presented On The Merits Confirms That The Ninth Circuit Court Of Appeals And District Court Properly Held That Petitioner Is Not Entitled To Due Process Protection, Therefore Negating Petitioner's Further Tangential Arguments Against Respondents

A review of the Question Presented on the merits would also confirm the validity of the Ninth Circuit's affirmation of the District Court's grant of summary judgment in favor of County Respondents. Petitioner's Due Process claim is based upon the Fourteenth Amendment, which provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. To sustain a Due Process claim, a plaintiff must allege facts from which a reasonable fact finder could conclude that (1) he or she was deprived of a property interest, and (2) that the government did so without Due Process of law. *Huskey v. City of San Jose*, 204 F.3d 893, 900 (9th Cir. 2000) (citing *Brewster v. Bd. of Educ. of the Lynwood Unified School Dist.*, 149 F.3d 971, 982 (9th Cir. 1998)). The lower courts in this case correctly held that Petitioner failed to establish the existence of any protected property interest in an employment position that he had obtained through a tainted process that violated County law. Without any property interest, Petitioner clearly cannot support any Due Process claim, as a matter of law.

According to Petitioner, his "employment agreement and the County Charter specifically gave him

due process rights if he were to face termination." *See* Petition at 22. Such a broad, unfounded statement underscores the fact that Petitioner's entire position is based upon the mistaken premise that Petitioner was "terminated" from his employment without being given an adequate opportunity to state his objections. Petitioner, however, fails to address the fact that he never had a protected property interest in his employment agreement in the first place because his selection to the position of Chief of Police arose from a compromised process that violated the Kauai County Charter and the Kauai County Code. Accordingly, Due Process rights never materialized because Petitioner's appointment was void from the outset, as a matter of law.

County Respondents do not dispute that a public employee may have a property interest in continued employment. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985). However, contrary to Petitioner's assumptions, not every public employment situation creates an expectation of continued employment that rises to the level of a property interest protected by the Due Process Clause. *See Pleva v. Norquist*, 195 F.3d 905, 914 (7th Cir. 1999). The property interest is derived from and defined by state law. *See Shlay v. Montgomery*, 802 F.2d 918, 921 (7th Cir. 1986); *see also Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (property interest must be established "by existing rules or understandings that stem from an independent source such as state law – rules or

understandings that secure certain benefits and that support claims of entitlement to those benefits"). As correctly held by both the Court of Appeals and the District Court, Petitioner never derived any "legitimate claim of entitlement" to the Chief of Police position because the manner in which he was selected violated the County Charter and Code of Ethics provisions.

The record evidences that Judge McConnell, an independent and well-respected hearing officer, conducted a contested case hearing during which he evaluated all of the evidence and listened to oral testimony before ultimately concluding that Ching had, in fact, violated Article XX, Section 20.02E of the Kauai County Charter and Chapter 3, Article 1, Section 3-1.6 of the Kauai County Code when he used his position as a Commissioner to secure an unwarranted advantage and treatment for Petitioner over the other candidates for Chief of Police. There is no dispute that each party to that hearing was afforded a full and complete opportunity to call and examine witnesses and to offer evidence.

Petitioner similarly does not dispute that the tainted selection process that resulted in Petitioner's appointment as Chief of Police violated County law. Chapter 3, Article 1, Section 3-1.11(a) of the Kauai County Code provides that:

> In addition to any other penalty provided by law, **any contract entered into by the County in violation of this Article [*i.e.*,**

> **Code of Ethics] is voidable on behalf of the County at the option of the Director of Finance**, provided that in any action to avoid a contract pursuant to this Section in the interests of third parties who may be damaged thereby shall be taken into account, and the action to void the transaction is initiated within sixty (60) days after the determination of a violation under this Article. The County Attorney shall have the authority to enforce this provision.

Kauai County Code § 3-1.11(a) (emphasis added). Section 3-1.11(b) of the Kauai County Code further provides:

> Any favorable county action obtained in violation of any of the standards for councilmen or employees is voidable in the same manner as voidable contracts as provided for under Section 3-1.11(a); and the County by the County Attorney may pursue all legal and equitable remedies available to it.

Kauai County Code § 3-1.11(b). These provisions make clear that any contract entered into in violation of the Code of Ethics could be voided by the Director of Finance if done within sixty days, and if the interests of third parties are taken into account. Petitioner does not dispute that the County Respondents followed the procedure set forth in Chapter 3, Article 1, Section 3-1.11(a) of the Kauai County Code. Petitioner, however, appears to disagree with the decision to follow that procedure.

In his Petition, Petitioner again relies upon a legal theory that he did not argue before the District Court and raised for the first time before the Court of Appeals. Issues raised for the first time on appeal are generally deemed waived. *Aholelei v. Dept. of Public Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007). The appellate court will review an issue not raised in the district court only if necessary to prevent manifest injustice, and if the proponent shows exceptional circumstances why the issue was not raised below. *Int'l Union of Bricklayers & Allied Craftsman Local 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985). Review of the issue regarding whether the misconduct of one Commissioner should invalidate the whole Commission's decision is not necessary to prevent manifest injustice. Petitioner has not alleged any exceptional circumstances that prevented him from raising this new legal theory below. Therefore, this Court need not decide this issue which was raised for the first time on appeal.

Even if the Court decides to undertake review of this issue, Petitioner does not dispute that the County Respondents had the authority to void his contract under the County rules and that the County Respondents followed the correct procedure. Petitioner now infers that the misconduct of one Commissioner should not have invalidated the action of the rest of the Commission who voted to select Petitioner as Chief of Police. To support this argument, Petitioner again relies on *Hui Malama Aina O Ko'olau v. Pacarro*, 4 Haw. App. 304, 666 P.2d 177

(1983) and *Waikiki Resort Hotel, Inc. v. City and County of Honolulu*, 63 Haw. 222, 624 P.2d 1353 (1981). Both of these cases, however, were already considered by the Court of Appeals and are distinguishable from the facts of this appeal.

First, unlike *Hui Malama* and *Waikiki Resort*, in this appeal, an independent hearing officer, Judge E. John McConnell, evaluated the process and found that Ching conferred an unfair advantage upon Petitioner. Based on the independent evaluation of Judge McConnell, the Ethics Board recommended to the Council that the Director of Finance void Petitioner's employment contract.

Furthermore, in *Waikiki Resort* and *Hui Malama*, the disqualification of the board member was based on failing to make proper disclosures. *Waikiki Resort*, 63 Haw. at 248-49, 624 P.2d at 1371-72; *Hui Malama*, 4 Haw. App. at 318, 666 P.2d at 186. In this case, however, the disqualification of Ching was not based on an inadvertent failure to disclose a conflicting interest; rather, Ching actively worked in a way that manipulated the whole process by conducting a concerted campaign to get Petitioner elected to the Chief of Police position. As such, the Petitioner cannot argue that the selection of Petitioner as Chief of Police should stand despite Ching's actions which tainted the overall selection process.

Petitioner simply cannot get around the fact that an employment agreement that is null and void, such as the employment contract being evaluated here, is

incapable of creating any property interest because such a contract cannot conceivably give rise to a legitimate expectation of continued employment. *See Shlay*, 802 F.2d at 922. Public employment contracts that violate statute or ordinance are void from the outset and, as such, cannot give rise to a protected property interest because no such interest can arise from an illegal contract. *Walsh v. Bollas*, 612 N.E.2d 1252, 1256 (Ohio Ct. App. 1992) (holding that no Due Process rights can arise from public employment contract that is void for being in violation of anti-nepotism rule).

The District Court aptly relied on cases from other jurisdictions to support its conclusion that contracts that are null and void are incapable of creating property interests because they are incapable of giving rise to any legitimate expectation of continued employment. *See Shlay*, 802 F.2d at 922 ("There is no question that contracts which are in violation of law are null and void. . . . It is also clear that contracts which are null and void are incapable of creating property interests since such a contract cannot conceivably give rise to a legitimate expectation of continued employment. . . ."); *Walters v. Village of Colfax*, 466 F. Supp. 2d 1046, 1057 (C.D. Ill. 2006) (the court refused to rewrite the employment contract, and instead, held that the employment contract was completely unenforceable because it was void from the moment of execution, and therefore could not provide the plaintiff with a constitutionally protected property interest); *City of Beaumont v.*

Spivey, 1 S.W.3d 385, 396 (Tex. App. 1999) (because appointment for public employment did not substantially comply with applicable statutes, court held that the appointment was null and void from the outset, and therefore incapable of conferring an expectation of a property interest in continued employment); *Walsh*, 612 N.E.2d at 1256 (no Due Process rights can arise from public employment contract which is void for being in violation of a state anti-nepotism law because "no rights may arise from an illegal contract.").

The Ninth Circuit Court of Appeals subsequently affirmed the District Court's reasoning, holding that:

> [t]he district court correctly determined that Lum did not have a property interest in his employment and, thus, does not have a viable due process claim. Lum's employment agreement was tainted by ethical violations by one of the police commissioners, so it was illegal and void ab initio. *Cf. Peine v. Murphy*, 377 P.2d 708, 712 (Haw. 1962). A void contract cannot give rise to a property interest. *See Bollow v. Fed. Reserve Bank of S.F.*, 650 F.2d 1093, 1099 (9th Cir. 1981).

Ninth Circuit Opinion, Petition Appendix at 3a. As correctly noted by the Court of Appeals, Lum's

employment contract was void for fraud, and thus could not convey any Due Process protection.[1]

Petitioner does not offer any legal authority to refute the lower courts' rulings. Instead, Petitioner relies heavily upon cases that are inapposite here. In his Petition, Petitioner cites the following three cases for support, all three of which Petitioner presented to the Ninth Circuit Court of Appeals: *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *McClure v. Indep. School Dist. No. 16, Mayes County, Oklahoma*, 228 F.3d 1205 (10th Cir. 2000); and *Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990). These cases, however, fail to support Petitioner's untenable position that a "property interest" somehow materializes when the process by which he was selected to his

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[1] Indeed, under Hawaii law, if a contract is void, it is treated as a nullity. For example, where a contract is void as a result of "fraud in the factum," the following is applicable:

> If, because of a misrepresentation as to the character or essential terms of a proposed contract, a party does not know or have reasonable opportunity to know of its character or essential terms, then he neither knows nor has reason to know that the other party may infer from his conduct that he assents to that contract. In such a case there is no effective manifestation of assent and **no contract at all**.

See Standard Finance Co., Ltd. v. Ellis, 3 Haw. App. 614, 618, 657 P.2d 1056, 1059 (1983) (citing Restatement (Second) of Contracts § 163, cmt. a (1981)) (emphasis added). Similarly, an agreement that is declared void *ab initio* as contrary to public policy is simply invalid as to the parties. *See Burk v. Sunn*, 68 Haw. 80, 705 P.2d 17 (1985).

employment position was undisputably flawed. Moreover, the facts in the three cases differ significantly from the facts in this case because the plaintiffs in each of Petitioner's cited cases all had a property interest in their positions, unlike Petitioner, but were then either terminated from their employment or denied some employment benefit based upon some purported "cause." The three cases are clearly distinguishable, and are therefore inapplicable here.

Accordingly, Petitioner has no "legitimate claim of entitlement" to his continued employment as Police Chief, and accordingly, no property interest protected by the Due Process Clause. As such, Petitioner's arguments that he was denied Due Process protection by Director Tresler and by the adoption of the hearing officer's ruling are without merit. The lower courts therefore did not err in finding in favor of the County Respondents as to Petitioner's Due Process claim.

IV. CONCLUSION

Based on the foregoing reasons and authorities, Respondents Kauai County Council, Bryan Baptiste, Michael H. Tresler, and Kauai County respectfully request that Petitioner King Chi Lum's Petition For Writ Of Certiorari be denied, or alternatively, the decision of the Ninth Circuit Court of Appeals be affirmed.

Dated: Honolulu, Hawaii, July 21, 2010.

Respectfully submitted,

GREGG M. USHIRODA
Counsel of Record
MELVYN M. MIYAGI
ANGELA T. THOMPSON
WATANABE ING LLP
First Hawaiian Center
999 Bishop Street, 23rd Floor
Honolulu, Hawaii 96813-4428
Telephone: (808) 544-8300
Facsimile: (808) 544-8399
Email: gushiroda@wik.com

ALFRED B. CASTILLO
OFFICE OF THE
COUNTY ATTORNEY
COUNTY OF KAUAI
4444 Rice Street, Suite 220
Lihue, Hawaii 96766
Telephone: (808) 241-4930

Counsel for Kauai County Council, Bryan Baptiste, Michael H. Tresler, and Kauai County